Jammu & Kashmir High Court
Shri Ramesh Chand Kathuria And ... vs M/S Trikuta Chemicals (P) Ltd And ... on 17 July, 2018

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
....

A.A. No.12/2012 MP No.10/2014 c/w A.A. no.04/2016 Date of order: 17.07.2018

1.Shri Ramesh Chand Kathuria and another v. M/s Trikuta Chemicals (P) Ltd. and anr

2.M/s Trikuta Chemicals pvt. Ltd. v. Ramesh Chand Kathuria and another Coram:

Hon'ble Mr Justice Tashi Rabstan, Judge Appearing Counsel:

For Petitioner(s): Mr. Harish Malhotra, Senior Advocate with Mr C. S. Azad, Advocate for petitioners in AA No.12/2012 and respondents in AA No. 04/2016 For Respondent(s): Mr. Z. A. Shah, Senior Advocate with Mr Vipin Gandotra, Advocate for respondents in AA No.12/2012 and petitioners in AA No.04/2016.

Whether approved for reporting? Yes.

1. Impugned in both Arbitration Applications is the Award dated 27th January 2012, passed by the Arbitrator, appointed by this Court vide order dated 5th June 2009 in A.A. no.32/2008. Applications are taken ad seriatim.

A.A. No.12/2012

2. Respondents plead that they approached petitioners with a proposal that respondents were owning an industrial plot of land admeasuring 08 Kanals situated at SIDCO Industrial estate, Bari Brahmana, Jammu, which respondent no.1 had acquired by means of a lease for a period of 90 years from J&K SIDCO vide registered Lease Deed dated 16th December 1995. Respondents also represented to petitioners that respondent no.2 is c/w A.A. no.04/2016 permanently registered SSI Unit and had a sanctioned power load of 1,000 KVA vide PDD Order no.289 of 1995 dated 29th September 1995. Respondents, it is averred, further represented that they were holding another industrial plot of land admeasuring 16 Kanals situated in SIDCO Industrial Estate, Bari Brahmana, Jammu, on lease hold basis in favour of respondent no.1, for which respondent no.2 was fully authorised to enter into a Memorandum of Understanding with petitioners. Based upon the representation made by respondents, petitioners agreed to purchase leasehold rights in respect of two Industrial Plots admeasuring 08 Kanals and 16 Kanals situated in SIDCO Industrial Estate, Bari Brahmana, Jammu, for total consideration of Rs.4.61 Crores, subject to the condition that respondent no.2 would get the leasehold rights transferred to a company to be formed and subject to further condition that respondents were able to get the power connection of 1000 KVA changed in the name of the said company to be formed and the purpose of use of said power connection changed to induction furnace for steel melting and that permission would be granted to change existing shareholders and directors of aforesaid company to be formed and subject to further

condition that respondents would get permission of land existing in favour of respondent no.1, transferred in favour of said company to be formed in which ultimately petitioners were to be shareholders and c/w A.A. no.04/2016 directors. Accordingly, a memorandum of understanding dated 18th March 2008 was executed between parties and as provided under said MOU, petitioners paid a sum of Rs.1.01 crore to respondents immediately on signing of said MOU and balance sum was to be paid. In terms of MOU, in addition to a sum of Rs.1.01 crore already paid on signing aforesaid MOU, another sum of Rs. 1.85 crores, was to be paid by petitioners to respondents upon fulfilment of various conditions. According to petitioners, balance sum of Rs.1.75 crore was to be paid by petitioners within 21 days of the grant of permission for transfer of land belonging to respondent no.1 in favour of company taken over by petitioners and against delivery of physical vacant possession of said property to petitioners or aforesaid company to be formed which by then shall belong to petitioners. Despite the fact that petitioners had paid a sum of Rs.1.01 crore to respondents till execution of MOU which was executed as far as back on 18th March 2008, respondents have miserably failed to take steps as were otherwise envisaged under said MOU dated 18th March 2008, inasmuch as respondents failed to form company / intimate to petitioners about its formation as was to be done immediately after execution of said MOU and further failed to take any permission/NOC from power department for using connection of 1000 KVA for new activity i.e. steel melting and for transfer of said connection in the name of private limited company so c/w A.A. no.04/2016 formed for new line of activity, i.e. steel melting and that respondents further failed to take any permission for new line of activity, i.e. steel activity.

3. Further submission of petitioners is that as a result of delays caused by respondents, industrial policies, which were in vogue at the time of execution of MOU dated 18 th March 2008, and which were in fact very basis of petitioners having agreed to acquire said land, have been withdrawn; resultantly exemption and incentives which were available at the time of execution of said MOU are now either not available or have been drastically reduced to much lower percentage which have made the project entirely unviable. Respondents have also not fulfilled their obligations for getting necessary permission from power department for transfer of change in use of power connection and transfer of same in favour of company to be formed and to be transferred in favour of petitioners. Acts and omissions at the end of respondents after executing MOU dated 18th March 2008, have made enforceability of said MOU redundant. It is maintained by petitioners that though no time was specified in aforesaid MOU, yet it was to be completed by respondents within a reasonable time and respondents have no right or authority to delay the same unreasonably. Since respondents were not taking steps and were not in a position to obtain permission as contained in aforesaid MOU, parties had meetings in which it was admitted by c/w A.A. no.04/2016 respondents that because of change in policy, it was not possible and viable for setting up steel melting plant over said plot and respondents asked petitioners whether they could change to any other industry or not. Since said change was not at all acceptable to petitioners as petitioners had agreed to acquire the said land only with a condition that it is suitable for running an induction furnace for steel melting and that petitioners would be granted incentives and excise exemptions as per industrial policy in vogue at the time of said MOU and would get existing power connection transferred in their name with change in use of same including change in use to induction furnace for steel melting and since very purpose has been frustrated by respondents on account of their own act and omissions, very existence of aforesaid MOU has shaken.

4. It is also avowed by petitioners that since aforesaid proposal for change of use of said industrial land was not acceptable to petitioners, they made it clear that on account of aforesaid acts and defaults committed by respondents, petitioners are not in a position to wait any further and accordingly requested respondents to refund their money so that said chapter is closed for all times to come. Despite the fact that demand made by petitioners was quite genuine, respondents did not respond to said offer and accordingly wrote a registered AD letter in November 2008, revoking aforesaid MOU dated 18th c/w A.A. no.04/2016 March 2008 and called upon respondents to refund amount of Rs.1.01 crore lying with them under aforesaid MOU within seven days of receipt of said notice failing which respondents would become liable to pay interest @ 24% per annum from expiry of seven days of receipt of said notice. It is claimed by petitioners that aforesaid notice did not bear any date of November, 2008, yet the said notice was duly received by respondents on 15th November 2008. However, respondents vide their letter dated 18th November 2008, refuted petitioner's aforesaid demand and denied their liability for refunding aforesaid amount. Nevertheless, respondents, in their Reply, had admitted that they had not been able to get NOC for use of 1000 KVA existing power connection to new activity, but attributed said default to petitioners on a ground that it could not be done as petitioners failed to give them a detailed project report. According to petitioners it was never a requirement under contract and contents of said notice dated 18th November 2008 are absolutely wrong and contrary to the legal factual position. The said notice is stated to have been suitably replied by petitioners vide letter dated 25th November 2008. Thereafter on account of disputes having arisen a petition, filed before this Court, was allowed and vide order dated 5th June 2009 learned Arbitrator was appointed as a sole Arbitrator to adjudicate upon disputes between parties. Respondents c/w A.A. no.04/2016 filed their statement of claims while petitioners filed not only reply to the same but also counter claim.

5. Petitioners aver to have raised counter-claims before learned Arbitrator, which are:

> a) Counter claim no.1 The petitioners claim a sum of Rs.1.01 crore towards refund of amount paid under MOU dated 18th March 2008.
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> b) Counter claim no.2 The petitioners claim interest @ 24% p.a. on the amount as claimed under claim no.1.
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> c) The petitioners also claimed cost of proceeding amount to Rs.10.00 lacs.

6. According to petitioners, respondents claimed following amounts:

a) Rs.1.01 Crore received by respondents under MOU dated 18th March 2008 stands forfeited on account of various acts of omission and commission committed by petitioners and that petitioners are not entitled to claim refund of the amount.

b) On the express understanding recorded in MOU dated 18th March 2008, respondents incurred expenses in all amounting to Rs.14,77,388.40.

c) Due to non-adherence of MOU by petitioners, respondents suffered losses on account of business, which they were required to close before handing over subject matter of MOU to petitioners and respondents claimed Rs.87,79,080/- on account of the same.

d) Respondents claimed Rs.10.00 lacs on account of expenses involved in arbitration proceedings.

c/w A.A. no.04/2016

7. Learned Arbitrator vide Award dated 27th January 2012 is avowed to have partly allowed counter claim no.1 of petitioners, awarding a sum of Rs.50.50 lacs, while other claims of petitioners were rejected. Learned Arbitrator is also stated to have partly allowed claim no.1 of respondents while allowing forfeiture of Rs.50.50 lacs, and also aggrieved for not allowing complete refund of Rs.1.01 crores to petitioners and also not allowing interest as well as cost as claimed by petitioners.

8. Petitioners are aggrieved of Award dated 27th January 2012, passed by the learned Arbitrator and have come up with application on hand, bearing A.A. no.12/2012 under Section 34 of J&K Arbitration and Conciliation Act, 1997 (for short Act of 1997) beseeching quashment of Award dated 27th January 2012 qua it does not allow counter claims of petitioners in its entirety. Petitioners also seek to maintain the Award insofar as it relates to allowing in part counter claim of petitioners while reserving right of petitioners to claim balance amount of counter claims including balance amount of counter claim no.1, which has not been allowed by learned Arbitrator. The grounds of challenge taken by petitioners are:

a) Arbitral award so far as it does not allow counter claims filed by petitioners in its entirety and so far as it partly allows claim no.1 in favour of respondents, is contrary to law and facts of case.

c/w A.A. no.04/2016

b) Learned Arbitrator has acted in violation of contract as well as law of land in making and publishing arbitral award inasmuch as learned Arbitrator on one hand has agreed with the contention of petitioners that respondents did not convert its proprietary concern into a private limited company, which was first condition to be fulfilled by respondent, but on other hand has given a finding that both petitioners and respondents are at fault and have made MOU redundant and therefore 50% of amount paid is liable to be forfeited. The said finding is totally perverse on the face of it and against admitted evidence on record.

c) Learned Arbitrator further erred in not appreciating the fact that as per Clause 2 (iii) respondents were to fulfil the conditions contained therein. Learned Arbitrator while admitting that M/s J.K. Alloys has not been converted into a private limited company and a new company has been formed but has returned a finding that the lease could not be changed by lessor in the name of aforesaid company because of non- submission of a detailed project report (DPR). DPR was required only at fourth step and was not required for first three steps. That stage of fourth step has not arisen so far and respondent had even failed to fulfil first three steps which were condition precedent for performance of MOU and in absence of fulfilment of c/w A.A. no.04/2016 first three steps,

petitioner could not be held guilty of any fault.

d) Learned Arbitrator further failed to appreciate that there was otherwise no responsibility for petitioner to give any DPR. Procurement of DPD from SIDCO or any other approved consultant by M/s J.K. Alloys was responsibility of respondent.

e) Learned Arbitrator did not appreciate importance of conversion of proprietary concern M/s J. K. Alloys into a private company as it was only after conversion of proprietary concern into private limited company. Permission could be sought for from lessor for change of leasehold rights from the name of M/s J. K. Alloys to the said new company. For these two steps no DPR was required whereas learned Arbitrator has unnecessarily linked the issue of DPR with aforesaid two steps. Conversion of proprietary concern into a private limited company was vital as it would have avoided subletting and lessor could be easily allowed transfer of proprietary lease in favour of private limited company, if formed, from conversion of proprietary concern to a private limited company. Learned Arbitrator in this regard did not even consider judgement of the Supreme Court as reported in (1986) 3 SCC 62 and since it has come in evidence that proprietary concern has not been converted into private limited company, therefore, it is respondent who committed breach of even first step. In c/w A.A. no.04/2016 this regard reference to cross-examination of Shri Nandan Kuthalia, who appeared on behalf of respondent is relevant. The answers made by Shri Nandan Kuthalia make it clear that existing proprietary concern, M/s J. K. Alloys, was never converted into a private limited company. Moreover, Memorandum and Articles of Association of M/s J. K. Alloys and Steel Pvt. Ltd., which company respondent alleged to have formed after MOU dated 18th March 2008, did not show at all that existing proprietary concern has been converted into a private limited company or the company so formed has to take over existing proprietary concern. Thus, in view of aforesaid situation, it is absolutely clear that existing proprietary concern of M/s J. K. Alloys has not been converted into a private limited company. Consequently, first condition and first step, which was to be taken by respondents in terms of clause 2 (iii) and clause 3 of MOU has admittedly not been fulfilled by respondent and formation of new company as alleged in the name of M/s J.K. Alloys and Steel Pvt. Ltd., cannot mean or construe to mean that respondent has fulfilled aforesaid conditions. Learned Arbitrator has in fact agreed to the said condition of petitioner but still held that both parties were at fault which is contrary to admitted evidence led before learned Arbitrator.

c/w A.A. no.04/2016

f) Learned Arbitrator has acted in violation of contract by holding that DPR was required for seeking permission from lessor for change of leasehold rights from the name of M/s J. K. Alloys to the said new company. First step was to convert a proprietary concern into a private limited company when that was not done, how could lease be transferred in the name of company by lessor and for that performance no DPR was otherwise required. The said position was clear in the contract and learned Arbitrator could not introduce a fresh contract in this regard.

g) Learned Arbitrator further failed to appreciate that respondent could not get power connection of 1000 KVA converted/transferred to company and could not take steps for converting said power connection to a new line of activity, i.e. steel melting. This was third steps since first two steps were

not completed, respondent could not otherwise have completed that stage, which fact has altogether been ignored by learned Arbitrator.

h) Learned Arbitrator had gone to fourth stage, upon which respondent relied upon before learned Arbitrator, which stage could have only come had three stages been completed by respondents and since first three stages were not completed by respondents, fourth stage could not have arisen and, therefore, question of supplying DPR by petitioner was otherwise irrelevant. In any event, giving of DPR was not responsibility of c/w A.A. no.04/2016 petitioners and was to be procured by respondents alone and data required for said purpose was admittedly given to respondents by petitioners. Learned Arbitrator failed to appreciate provisions contained in Section 51 and 52 of the Contract Act. The order of performance was to be strictly construed in terms of the Contract Act and responsibility for fulfilling obligations as contained in para 2 (iii) and (iv) was totally upon respondent alone which stages were not crossed by respondent.

i) The award of learned Arbitrator is in violation of Section 46 of the Contract as when no time is specified in contract, reasonable time is to be considered as having been agreed between parties and respondent till date of revocation of MOU, i.e. till 18th November 2008, did not fulfil any of conditions and thus, petitioner was entitled to revoke contract.

j) The Award of learned Arbitrator is against policy of the State inasmuch as award breaches terms and conditions of the contract as well as law of the land.

9. Objections have been filed by respondents. They insist that petition under Section 34 of the Act of 1997 is liable to be dismissed as none of the grounds raised in the arbitration application does qualify to be grounds under Section 34 nor the award can be set-aside on any of grounds. Respondents also state that petitioners' pela that award is against policy of the State, is vague inasmuch as c/w A.A. no.04/2016 it does not show which policy of the State has been violated by respondents. No breach is claimed to have been committed by respondents nor any law has been violated by them. The Award is said to have been passed by learned Arbitrator on the basis of evaluation of material existing on record, law applicable to the case and stand taken by parties. The view taken by learned Arbitrator, based on appreciation of evidence, cannot be questioned under Section 34 of the Act of 1997. The view of learned Tribunal allowing 50% of the amount to party opposite is a view not supportable under public policy. Once learned Arbitrator had arrived at conclusion that party opposite was guilty of breach of contract, no part of amount received by answering respondent was refundable to party opposite as it stood forfeited under the Contract.

A.A. No.04/2016

10. Instant application has been filed by M/s Trikuta Chemicals (P) Ltd and M/s J.K. Alloys. Applicants aver that pursuant to Order passed by this Court in Arbitration Application bearing No. AA/32/2008 dated 5th June 2009, this Court, allowing it with the consensus of the parties, appointed the Mr Justice K.K. Gupta (Retd) as Sole Arbitrator for adjudicating disputes between parties. The order further directed that learned Arbitrator, after adjudicating upon disputes, would make and publish Award within statutory period. Learned c/w A.A. no.04/2016 Arbitrator entered

upon reference. In first instance, respondents (Shri Ramesh Chand Kathuria and Shri Ashish Jain) filed their counter claims and also produced some documents. In response thereto, petitioners submitted their statement of claims and also filed Reply to Counter-Claims of respondents. Petitioners also filed documents in support of their case. On behalf of respondents, Reply was filed to statement of claims of present petitioners and Rejoinder to Reply was also filed against Reply of petitioners filed to counter claims. Parties also submitted their documents and recorded their admission and denial. On behalf of petitioner, Rejoinder was filed to Reply, submitted by respondents to statement of claims. Learned Arbitrator, without framing issues (points in controversy) allowed parties to adduce evidence in support of their respective stands. On behalf of petitioners, affidavits of five persons, namely, Nandan Kuthiala, Sanjay Mehra, Raj Kohli, D.K. Pandoh and Tarsem Lal, were filed. Besides this, two persons, namely, Sunil Gupta and Shiv Paul Salathia, were produced as witnesses. Respondents desired to cross-examine all witnesses, whose affidavits had been filed. They were, accordingly, produced before learned Arbitrator for their cross-examination by respondents. On behalf of respondents, sole affidavit was filed by Shri Ashish Jain. He was also subjected to cross-examination by petitioners. An affidavit was also filed on behalf of Shri Romesh c/w A.A. no.04/2016 Chand Kathuria but he was not produced for purposes of cross-examination. Parties produced evidence as also documents. Learned Arbitrator thereafter heard counsel for parties. Written submissions were also submitted by parties before learned Arbitrator. Award was announced by learned Arbitrator on 27th January 2012. According to petitioners, learned Arbitrator disallowed claim of petitioners to the extent and in the manner as follows:

i) Learned Arbitrator has not accepted forfeiture of entire earnest money of Rs.1.01 crore but has allowed forfeiture only to the extent of Rs.50.50 Lacs. Learned Arbitrator has directed petitioner to refund an amount of Rs.50.50 Lacs to respondents.

ii) Learned Arbitrator has not allowed claim of petitioners to the extent of Rs.14,77,388.40, which amount was spent by petitioners for performing various acts.

iii) Learned Arbitrator has disallowed claim of petitioners of Rs.2,58,000/- which petitioners had spent in formation and registration of new company.

iv) Learned Arbitrator has also disallowed claim of petitioners to Rs.46,700/-, which petitioners had paid to M/s Pandoh and Associates, Chartered Accountants.

v) Learned Arbitrator has also disallowed expensed of Rs.8200/- incurred by petitioners in formation of new company. Learned Arbitrator also disallowed claim c/w A.A. no.04/2016 of petitioners for Rs.8,07,288.40, which petitioners had paid to Power Development Department between 1.4.2008 to 15.11.2008.

vi) Learned Arbitrator has also disallowed claim of petitioners to the tune of Rs.15000/- and Rs.30000/-, which was paid by petitioners as lease rent for 08 Kanals and 16 Kanals of land respectively between 1.4.2008 to 15.11.2008.

vii) Learned Arbitrator has also disallowed claim of petitioners to the tune of Rs.2,62,200/- which petitioners had spent for levelling the land.

viii) Learned Arbitrator has also disallowed claim of petitioners for Rs.50,000/-, which petitioners had incurred by way of travelling expenses from Jammu to Delhi and vice-versa.

ix) Learned Arbitrator has also disallowed claim of Rs.27.00 Lakhs which petitioners had suffered by way of loss while disposing of Plant and Machinery by way of distress sale.

x) Learned Arbitrator has also disallowed a sum of Rs.10,79,080/-, which petitioners had paid to their employees.

xi) Learned Arbitrator has disallowed claim of petitioners for Rs.50.00 lakhs which they had claimed on account of good will and reputation.

c/w A.A. no.04/2016

xii) Learned Arbitrator has also disallowed litigation expenses of Rs.10.00 lakhs as well as interest claimed by petitioners.

11. The Award has been challenged on the ground that petitioners did not fail in performing their obligation as was required to be performed by them in terms of MOU and that it had been respondents, who failed in their obligation, as a result whereof, petitioners could not perform their obligations. Respondents failed to provide DPR of Steel Melting Manufacturing Unit. This, as maintained by petitioners, was essentially required enabling petitioners to seek alterations/changes in the certificate of registration from District Industries Centre so that petitioner would have been able to seek transfer of power connection of 1000 KVA and of leasehold rights in favour of newly formed company, i.e. JK Stainless Steel and Alloys Limited. It was the case of petitioners that they had repeatedly asked respondents to provide DPR duly certified by competent authority, i.e. J&K ITCO and/or any other authority as recognised by Directorate of Industries. The impugned Award is also challenged on the ground that the stand of respondents was that they had provided a handwritten note to one Gautam Mehra, brother of Sanjay Mehra on 20th March 2008, within two days of signing of MOU. Respondents also relied upon two e-mails dated 21st March 2008 and 25th march 2009. By placing reliance on above respondents clearly admitted c/w A.A. no.04/2016 that they were required to provide to petitioners a detailed project report to enable petitioners to proceed further in the matter. Petitioners explained and brought material on record to show that no handwritten note was provided nor Mr Gautam Mehra was examined as witness. Petitioners also brought on record that two e- mails pertained altogether to different project of respondents located at Gangyal called Ganga Metal. Next ground of challenge of petitioners is that learned Arbitrator clearly erred in law in not recording a finding as to how and in what manner petitioners had not performed their obligation. In fact, learned Arbitrator has nowhere recorded in the finding based on evidence against petitioners. Learned Arbitrator could not have asked claimants/petitioners to refund amount of Rs.50.50 lacs to respondents. Conclusion drawn by learned Arbitrator is said to have not been supported by reasons and are contrary to law inasmuch as in the findings recorded by

learned Arbitrator, it became self-evident that if petitioners had allegedly failed to perform their obligation under MOU, it was only because respondents had failed to perform their obligation under MOU, which resultantly prevented petitioners from performing their obligations under MOU. It was both express and implicit in MOU that respondents required the Unit for a purpose other than for which it was registered by petitioners before execution of MOU and that new company was required to c/w A.A. no.04/2016 be formed only to enable respondents to set up manufacturing unit of their choice and that obligations of petitioners were only to transfer power connection and leasehold rights to new company. The core issue of manufacturing activity and its registration was responsibility of respondents and only thereafter other things could follow. Petitioners maintain that it is settled principle of law that construction of an agreement/ document is a pure question of law. Learned Arbitrator was required to construct and interpret MOU between parties and then to evaluate material on record with a view to ascertain party guilty of not performing its obligation under MOU. Learned Arbitrator, as averred by petitioners, has not recorded any such finding but has simply directed petitioners to refund half of amount received by them, to respondents without having dealt with the matters in issue as well as law applicable to proven facts. MOU itself provided for forfeiture. Respondents have unilaterally revoked MOU and it is respondents who had observed MOU in breach. The amount received by petitioners under MOU was liable to be forfeited. Further ground of challenge of petitioners is that respondents had deliberately and intentionally violated MOU because respondents had agreed to take over assets of petitioners on express understanding that Central Government had allowed 100% exemption on Excise Duty on articles manufactured at the location of c/w A.A. no.04/2016 existing unit of petitioners and respondents wanted to avail benefit of said exemption. It so happened that MOU was settled on 18th March 2008. From 1st April 2008, the Central Government reduced limit of Excise exemption to 39%. It is as a result of this reduction that respondents developed cold feet and did not cooperate with petitioners despite knowledge of formation of company and instructions of District Industries Centre, Jammu, to provide DPR duly approved by J&K ITCO and/or some other recognised authority and that it is the case of petitioners that respondents did not want to continue with MOU and therefore failed to provide authentic DPR to petitioners to enable them to proceed in the matter. Respondents also unilaterally revoked MOU. However, learned Arbitrator failed to appreciate the stand of petitioners and instead without any supporting reasons announced the Award which does not satisfy legal requirements and is vitiated for being contrary to law. Another ground of challenge of petitioners is that entire amount was spent by petitioners to make premises suitable for delivery of possession to respondents upon completion of terms and conditions of MOU and all necessary steps were taken by petitioners to make site free from any encumbrance, available to respondents. The amount spent by petitioners would not have been spent by them if respondents were not interested in acquiring assets of petitioners. Petitioners also suffered loss because c/w A.A. no.04/2016 they could not negotiate transfer with any other party and they had to stop their operation/manufacturing activity only for purposes of valid and effective transfer of assets to respondents. Petitioners had to dispose of plant and machinery which they had installed at site by way of distress sale so that respondents take over acquired property from petitioners in due course of time. By unilateral revocation of MOU, entire amount spent by petitioners, which was initially intended for benefit of respondents, became their loss. One more ground of challenge to the impugned Award on behalf of petitioners is that learned Arbitrator has not recorded any finding as to why amount claimed has been disallowed by him. It is not supported by any law. The Award is not justified even on merits. Petitioners had

placed overwhelming material on record and established that they had not failed to perform their obligations under MOU. Learned Arbitrator has, though, mentioned the evidence produced on record but in its Award, learned Arbitrator has nowhere appreciated / evaluated evidence so produced. Mere mention of evidence in the Award does not mean consideration of evidence in accordance with law. Learned Arbitrator was required to determine civil rights of petitioners and on that basis was required to pass award. Instead learned Arbitrator has without determination of any matter in controversy passed award. Learned Arbitrator, being a judge of choice of parties, is required in c/w A.A. no.04/2016 law, to pass an award based on reasons, which reasons must emanate from evidence on record and prove fact and by application of relevant law, resolve the disputes. Learned Arbitrator has arbitrarily passed the Award, which, as maintained by petitioners, is contrary to public policy. It is one of important elements of public policy that adjudication of controversies by Arbitrators cannot be arbitrarily done but has to be in accordance with law, which would have ordinarily applied while deciding any dispute. Learned Arbitrator is not free to take any decision of his choice unless such decision is supported by proven facts and the law governing the subject.

12. Reply has been filed by respondents, in which they insisted that it was with the consent of parties that learned Arbitrator passed order dated 16th October 2010, providing that in regard to framing of issues, it has been decided that the claims and counter claims filed by parties would be treated as issues and no further issue was, therefore, required to be framed. It is contended that it was agreed by parties that since Mr Ashish Jain's affidavit was exhaustive, therefore, there was no occasion for duplicating evidence and it was agreed not to adduce Mr Ramesh Kathuria's evidence. Learned Arbitrator, according to respondents, erred in law and in fact acted in violation of contract by allowing forfeiture to the extent of Rs.50.50 lacs and simply directed petitioners to refund an amount of Rs.50.50 lacs to respondents, whereas in the c/w A.A. no.04/2016 facts and circumstances of the case, learned Arbitrator was bound to direct petitioners to refund complete amount of Rs.1.01 Crore. It is claimed by respondents that learned Arbitrator has wrongly held that respondents have failed to perform their obligations in terms of MOU whereas it was a clear case of failure on part of petitioners inasmuch as petitioners had miserably failed to convert its proprietary concern into private limited company, which was the first condition to be fulfilled by petitioners and had also miserably failed to get lease transferred from its proprietary concern in the company to be formed by converting proprietary concern and also miserably failed to take NOC from PDD for using power connection for new activity and consequently respondents were well within their rights to revoke the agreement and to call for the refund. It is no doubt that learned Arbitrator has not appreciated evidence in its true perspective whereas entire evidence was in favour of respondents and clearly proved case of respondents and entitlement of respondents' counter claim and partly awarding counter claim, learned Arbitrator acted against the contract as well as public policy and the award so far as it has allowed petitioners to retain 50% of amount is liable to be set- aside while learned Arbitrator ought to have awarded complete refund in favour of respondents.

13. I have heard learned counsel for parties and considered the matter.

c/w A.A. no.04/2016

14. Mr Harish Malhotra, learned senior counsel representing petitioners (Mr Ramesh Chand Kathuria and Mr Ashish Jain), to augment case set up by petitioners and after reiteration of factual submissions adumbrated in Arbitration Application, has tirelessly argued that upon execution of MOU and as mentioned in MOU as well, petitioners paid Rs.1.01 Crore to respondents and balance amount was to be paid in the manner and mode as stated in MOU. In terms of MOU, another sum of Rs.1.85 Crore was to be paid by petitioners to respondents upon fulfilment of various conditions, including: that respondents would convert proprietary concern of M/s J. K. Alloys into a private limited company; that lease would be changed by lessor in the name of private limited company; that NOC would be had from PDD for using power connection of 1000 KVA for new activity i.e. steel melting, or power connection of 1000 KVA would be transferred in the name of private limited company, so formed for new line of activity i.e. Steel Melting; that necessary permission for manufacturing of new line of activity would be had from Industries Department; that permission to change shareholding of private limited company, would be obtained from lessor; that respondents would handover/deliver physical possession of 08 Kanals of leasehold land, belonging to M/s J. K. Alloys and transfer of entire shareholding of said company in favour of petitioners or their nominees; that responsibility of c/w A.A. no.04/2016 getting NOC from J&K State Pollution Control Board for new line of activity, i.e. Steel Melting, would be of petitioners; that all expenses for getting necessary permissions as per clause 2(iii) would be borne by petitioners. According to learned counsel for petitioners, respondents have miserably failed to take steps as were otherwise envisaged in terms of MOU dated 18th March 2008 inasmuch as respondents failed to form company/ intimated petitioners about its formation as was to be done immediately after execution of MOU and further failed to take any permission/NOC from Power Department for using connection of 1000 KVA for new activity, i.e. steel melting and for transfer of said connection in the name of private limited company so formed for new line activity, i.e. steel melting and that respondents also failed to take any permission for new line of activity, i.e. steel activity.

15. Next submission of learned counsel for petitioners is that after waiting for sufficient time and looking to the fact that respondents had failed to fulfil their obligations as contained in MOU, petitioners revoked MOU vide its notice dated November 2008, duly received by respondents on 15th November 2008 and called upon respondents to refund amount of Rs.1.01 Crore, lying with them under MOU within seven days of receipt of said notice and also asked for payment of interest @ 24% p.a. In response to said notice revoking MOU, respondents c/w A.A. no.04/2016 vide their letter dated 18th November 2008 refuted said demand and denied their liability to refund said amount, as a result whereof, dispute arose between parties, which required adjudication by Arbitrator as provided under MOU. However, before petitioners filed a petition, respondents approached this Court with a petition, which was disposed of and Mr K. K. Gupta, a retired Judge of this Court, was appointed as an Arbitrator vide order dated 5th June 2009. It is pleaded that respondents filed their statement of claims and petitioners as well filed their count claims seeking for refund of Rs.1.01 crore along with interest @ 24% p.a. plus cost of proceedings. After pleadings were complete, parties led their respective evidence and after hearing parties, learned Arbitrator made and published his Award dated 27th January 2012 and partly allowed counter claim no.1 of petitioners, thereby awarding Rs.50.50 lacs while the other claims of the petitioners were rejected.

16. Learned senior counsel for the petitioners, to counterblast the impugned Award, has stated that impugned award is in violation of the contract between the parties and that the MOU as based upon the reciprocal obligations and the second payment of Rs.1.85 crore, was liable to be paid on fulfilment of the conditions as contained in the MOU. He states that the first step, the respondents were to take, was to convert their proprietary concern of M/s J. K. Alloys into a private limited company. He contends that it c/w A.A. no.04/2016 was admitted by the respondents in evidence that they have failed to convert the proprietary concern of M/s J. K. Alloys into a private limited company and instead had got a new company incorporated. Incorporation of a new company was not in consonance with the MOU and could not serve the purpose for which the MOU was executed. Unless the proprietary concern of M/s J.K. Alloys is converted into a private limited company, the lease, which was in the name of M/s J.K. Allays, could not have been transferred in favour of any other company and in such an eventuality it would tantamount to subletting and if the proprietary concern is converted into a private limited company, then in that eventuality there was no subletting and lease would have been easily transferred to the said company. Respondents have failed to complete second step, which was the change of lease from M/s J. K. Alloys, to the name of company, which was to be formed under first step. Similarly, respondents have also failed to get NOC from PDD for using power connection of 1000 KVA for new activity, i.e. steel melting and further failed to transfer power connection in the name of a private limited company, which was to be formed pursuant to first step. Thereafter, permission was to be sought from Industries Department for manufacture of new line of activity, i.e. steel melting. Respondents have tried to project that Industries Department could not grant necessary permission for manufacture of new line of activity, i.e. c/w A.A. no.04/2016 steel melting, as petitioners did not get project report prepared. There was no responsibility under agreement for petitioner to get DPR prepared whereas DPR was to be got prepared from ITCO, which was requirement of Industries Department and petitioners were only to give inputs or data required for said purpose, which was accordingly given to respondents by petitioners as is even admitted by respondents in evidence. Thus, it was a clear- cut case in evidence that respondents miserably failed to fulfil any of conditions contained in clause 2(iii) (a) (b) (c)

(d). The stage of payment of Rs.1.85 Crore did not reach at all. Though learned Arbitrator has, on one hand, agreed with contention of petitioners that respondents did not convert its proprietary concern into private limited company, but, on other hand, has given a finding that both petitioners and respondents are at fault and have made MOU redundant and therefore 50% of amount paid is liable to be forfeited. This finding, according to learned counsel, is totally in violation of contract. At no point of time there is any obligation on petitioners to achieve first three steps, i.e. conversion of proprietary concern of M/s J. K. Alloys into private limited company, changing of lease in the name of such company and receiving of NOC from PDD for using power connection for new activity. So far as fourth condition seeking necessary permission for manufacturing of new line activity, i.e. steel melting is concerned, that was also to be taken by respondents alone.

c/w A.A. no.04/2016 However, petitioners cooperated and gave full data required for getting DPR prepared, which was otherwise to be prepared by ITCO and it was responsibility of respondents to get it prepared and not that of petitioners.

17. Learned counsel for petitioners has strenuously argued that learned Arbitrator could not have fastened any responsibility upon petitioners, which was otherwise not upon them under MOU. Learned Arbitrator, who is creature of contract, has to act within four corners of contract and was to only see whether provisions of contract have been fulfilled by respondents or not and learned Arbitrator could not write any new contract between parties. When steps and conditions were mentioned step-wise, learned Arbitrator was only to return a finding whether those steps were fulfilled or not and the language of contract is absolute clear and it does not leave any room to come to conclusion that petitioners were also to do something for purpose of fulfilling that condition. The only responsibility of petitioners was to make payment or to get NOC from J&K State Pollution Control Board for new line of activity. The stage for getting such NOC was last stage when possession would have been handed over and factory ready to start and that stage never reached in present case and thus, no responsibility could have been fastened upon petitioner and consequently it could not have been said that petitioners were also at some fault with respondents. The c/w A.A. no.04/2016 said finding, according to learned counsel, is not only in violation of contract but also against evidence on record. As per MOU, wherever cooperation and assistance were to be taken from petitioners that was clearly provided under clause 5 of agreement. Petitioners were only required to cooperate and assist each other for seeking permission from ROC and lessor to allow change of shareholding of company to be formed by converting proprietary concern to private limited company in its favour and nothing else. The stage for cooperation and assistance would have arisen only when M/s J. K. Alloys, which was earlier a proprietary concern of respondents, was converted into a private limited company and lease transferred in favour of said company, then only stage for changing of shareholding in favour of petitioners, would have arisen. When first two steps were not taken by respondents, question of petitioners assisting or cooperating did not arise at all. Under clause 6 of MOU, it is respondents alone, who have to intimate petitioners in writing that all steps have been completed, which clearly envisaged that responsibility of fulfilling condition from (a) to (d) was of respondents alone and those were admittedly not fulfilled and therefore it could not have been said by learned Arbitrator that fault lies on both. In terms of agreement, more particularly, Clause 14 of MOU, it was clearly agreed that if government approvals are not accorded as per clause 2(iii) and (iv), then amount so received till that c/w A.A. no.04/2016 date would be returned to party of second party, i.e. petitioners. Since permission so envisaged under clause 2

(iii) and (iv) has not been granted and therefore money was liable to be refunded and to hold otherwise is violation of agreement, more particularly clause 14. Not even a single condition, as stated by learned counsel for petitioners, was fulfilled by respondents and therefore there was no question of any forfeiture of any amount by respondents. Learned counsel states it is no doubt true that learned Arbitrator is final authority to appreciate evidence on record, but learned Arbitrator cannot ignore admitted evidence on record nor can ignore relevant provisions of contract in this regard. By not awarding full refund of the amount to petitioners, learned Arbitrator has violated provisions of contract and Award so rendered is also against admitted evidence on record. The award so far as it has not allowed complete refund and the loss claimed by petitioner is liable to be set-aside. In support of his submissions, learned counsel for petitioners has placed reliance on Madras Bangalore Transport Co. (West) v. Inder Singh and others (1986) 3 SCC 62; Oil and Natural Gas Corporation Ltd v. SAW Pipes Ltd AIR 2003 SC 2629; Union of India v. Modern Laminators Ltd 2008 (3) Arb. LR 489 (Delhi); Sudhir Bros v. Delhi Development Authority & ors, 2009 (2) Arb.

LR (Delhi) (DB); and Poysha Oxygen Pvt v. Ashwini Suri & ors, 2009 (3) Arb. LR 533 (Delhi).

c/w A.A. no.04/2016

18. Per contra, Mr Z. A. Shah, learned senior counsel appearing on behalf of respondents (M/s J.K. Alloys and M/s Trikuta Chemicals Private Limited) insists that MOU dated 18th March 2008, both estates of M/s Trikuta Chemicals Private Limited and M/s J. K. Alloys were intended to be transferred to the petitioners for a total consideration of Rs.4.61 Crores. On signing MOU, Rs.1.01 Crore was paid and the balance amount was to be paid in the phased manner. Petitioners vide their notice of November 2008 revoked MOU and claimed refund of Rs.1.01 Crore within seven days of the receipt of the notice. The notice, revoking MOU, was responded by respondents vide their communication dated 18th November 2008. Respondents denied petitioners' claim to refund Rs.1.01 crore, which was forfeited by them. The loss suffered by respondents on account of breach of MOU by petitioner, was also communicated to them. Respondents also suggested appointment of an Arbitrator. Between 18th March 2008, when MOU was signed and November 2008, when petitioners unilaterally revoked MOU, following steps are claimed to have been taken by petitioners:

i) Immediately after signing MOU on 18th March 2008, M/s J. K. Alloys closed the unit and relieved all workmen after paying them their dues.

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ii) Entire plant and machinery, installed on the asset of M/s J. K. Alloys, was dismantled and removed.

iii) Between 19th March 2008 to 2nd April 2008, Memorandum and Articles of Association of Company were prepared/printed, fee of Rs.2.58 Lacs deposited; name of company, similar to the name suggested by petitioners, was registered and company was formally incorporated on 9th April 2008. These steps were taken by respondents within less than a month of signing of MOU.

iv) To proceed further in the matter, petitioners were to provide a DPR relating to steel melting involving change in the line of manufacturing activity, but petitioners did not cooperate despite communications dated 16th September 2008, 1st October 2008 and 12th October 2008. Between 18thMarch 2008 to November 2008 despite civil unrest in Jammu City, popularly known as Amarnath Land Row respondents urged petitioners on phone, in personal meetings and in writing to provide DPR as was demanded by Industries Department, before granting NOC for use of 1000 KVA existing power connection to new activity. Petitioners, according to learned senior counsel, did not cooperate with respondents and developed cold feet only because within nine days of c/w A.A. no.04/2016 signing MOU, the Government of India on 27th March 2008 substantially reduced incentives available to manufacturers who set up their manufacturing units in notified areas. It is pleaded that petitioners expressly maintain that availability of incentives to manufacturing units were the very basis for entering into MOU. As a consequence of non-cooperation of petitioners, breach of MOU, their claim for refund of Rs.1.01 Crore and claim of respondents to forfeiture of paid amount and for compensation of losses they suffered, disputes emerged between parties, which were

ultimately referred to Arbitrator by this Court vide order dated 5th June 2009.

19. Learned senior counsel for respondents also insists that the learned Arbitrator in his Award dated 27th January 2012 has arrived that a conclusion that respondents converted proprietary concern, M/s J. K. Alloys, into a Private Limited Company and formed a new Company, viz. J. K. Stainless and Alloy Private Limited. The new company was formed on 9th April 2008 in place of proprietary concern and as regards the stand of respondents, petitioners were required to provide DPR duly approved by ITCO or by approved Consultant of J&K Industries Department, which was not provided by petitioners, who maintain that they were not under obligation to provide DPR and in alternative maintain c/w A.A. no.04/2016 that they did not provide some documents in this behalf. According to learned senior counsel, learned Arbitrator noticed various established facts, which include that respondents initiated steps for seeking permission from Industries Department by addressing it a letter and in response thereto the said department required DPR prepared by ITCO or any other approved Consultant and that there are different versions of parties in regard to providing information for preparation of DPR, which in fact became source of non-fulfilment of requirements of MOU. It is on record that petitioners had decided to acquire lease hold property primarily for 1000 KVA power connection sanctioned in favour of owners and also for entitlement of 100% excise exemption on new line of activity and at the time of execution of MOU on 18th March 2008, exemption on payment of excise duty was in force and on 27th March 2008 the Central Government reduced said exemption from 100% to 39% with effect from 1st April 2008. In the termination notice of MOU, petitioners had specifically mentioned that as a result of delay caused by respondents, Industrial Policies, which were in vogue at the time of execution of MOU and which was, in fact, very basis of their having agreed to procure said property having been withdrawn and as a result of which, exemption in the incentives reduced to a much lower percentage made project unviable. Learned senior counsel states that Mr Ashish Jain, petitioner, has also c/w A.A. no.04/2016 stated so in his statement. Mr Romesh Kathuria, petitioner, has also in his affidavit affirmed it as one of the reasons for termination of MOU. Whatever be reasons for termination of MOU, this important fact also cannot be ignored but at the same it also appears from the evidence on record that after execution of MOU, parties had meetings at Jammu as well as at Delhi and petitioners had provided various records for preparation of DPR, which according to respondents, was, however, insufficient for getting report prepared either from ITCO or from some other approved Consultant.

20. According to learned senior counsel representing respondents, learned Arbitrator was not justified and has acted in contravention of agreement and legal consequences flowing thereto in not allowing forfeiture of entire amount of Rs.1.01 crore. Learned Arbitrator has found it as a fact that immediately after signing MOU on 18th March 2008, company was formed on 9th April 2008. Learned Arbitrator has also found that DPR was demanded by Industries Department from respondents and in turn respondents had asked petitioners to provide DPR duly approved by ITCO or some other approved Consultant of Industries Department. Learned Arbitrator has found that claim of petitioners that information with regard to DPR was provided vide email dated 21st March 2008 and 25th March 2008, was clearly misplaced as Industries Department had asked for DPR only on 11th c/w A.A. no.04/2016 April 2009. Learned Arbitrator has also found as a fact that petitioners developed cold feet after Central Government substantially reduced incentives and

petitioners had also entered into MOU on the basis that project would attract 100% incentives upon its transfer. Under MOU, parties were required to cooperate with each other and in order to complete the transaction, MOU in its intention provided that respondents would cooperate with petitioners which they failed to do. Learned Arbitrator has neither discussed nor given any reason as to why other claims made by respondents are disallowed. Only on the finding that both parties have observed MOU in breach, learned Arbitrator was not justified disallowing other claims of respondents. Conclusions of facts arrived at by learned Arbitrator and provisions of MOU between parties and reason of petitioners not to proceed with completion of deal, as discerned by learned Arbitrator from evidence, clearly led to only one conclusion that respondents had forfeited entire amount of Rs.1.01 crore justifiably. No reasons for allowing forfeiture only to the extent of 50% has been given by learned Arbitrator. The conclusions of facts by learned Arbitrator, it is stated, cannot be questioned under Section 34 of the Act and that learned Arbitrator has acted within his jurisdiction in evaluation of facts and drawing conclusion therefrom. Learned Arbitrator is said to have been entitled to draw conclusions from evidence as also from MOU and such c/w A.A. no.04/2016 conclusions, as said by learned senior counsel, cannot be question under Section 34 of the Act. In support of his submissions, learned senior counsel has placed reliance on the decisions rendered by the Supreme Court in Madras Bangalore Transport Company (West) v. Inder Singh, 1986 (3) SCC 62; Ashok Transport Agency v. Awadhesh Kumar and another, 1998 (5) SCC 567; Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd, 2003 (5) SCC 705; Raghu Lakshminarayanan v. Fine Tubes 2007 (5) SCC 103; Associate Builders v. Delhi Development Authority 2015 (3) SCC 49; National Highways Authority of India v. ITD Cementation India Limited (2015) 14 SCC 21; National Highways Authority of India v. ISC Centrodorstroy (2016) 12 SCC 592; United India Insurance Co. Ltd. v. Orient Treasures Pvt. Ltd 2016 AIR (SC) 363; and Satish Batra v. Sudhir Rawal (2013) 1 SCC

345.

21. Petitioners, Mr Ramesh Chand Kathuria and Mr Ashish Jain, entered into and executed a Memorandum of Understanding (MOU) on 18th March 2008. Why parties entered into and executed MOU and what were the reasons for them to enter into MOU is an agreement and contract aimed at sale of property in question and fulfilment of certain formalities in this regard by parties, it is imperative to have a glance of and discourse about what has been agreed and decided by parties to do, perform and undertake for ultimate conclusion and c/w A.A. no.04/2016 termination of the contract. Respondents - M/s J.K. Alloys and M/s Trikuta Chemicals Private Limited, being first party in Memorandum of Understanding - were desirous to sell, transfer, assign the proprietary concern - M/s J.K. Alloys at Phase-I, SIDCO Industrial Complex, Bari Brahmana, Jammu, established on 08 Kanals of leased land, as also to sell, transfer, assign the leasehold land comprising of 16 Kanals leased out by J&K SIDCO to M/s Trikuta Chemical Private Limited. MOU also mentions that parties of second part - petitioners, namely, Mr Ramesh Chand Kathuria and Mr Ashish Jain - were desirous to set up a Furnace for steel melting and looking for an industrial unit at Jammu. On their visit to Jammu and upon inspection of the land belonging to respondents (M/s J. K. Alloys as well as M/s Trikuka Chemicals Private Limited), petitioners (Mr Ramesh Chand Kathuria and Mr Ashish Jain) found aforesaid land of Respondents suitable to set up Furnace Industry for purpose of steel melting. Respondents (M/s J. K. Alloys and M/s Trikuka Chemicals Private Limited), as is discernible from MOU - looking to the desire of Petitioners, (Mr Ramesh

Chand Kathuria and Mr Ashish Jain), and looking to their own requirements - agreed to sell, transfer, assign unto Petitioners the concern, M/s J.K. Alloys and M/s Trikuta Chemicals Private Limited. Apropos excerpt of MOU, in this regard, having direct c/w A.A. no.04/2016 impact on the controversy in hand, is germane to be extracted infra:

> AND WHEREAS the parties of the first part looking to the said desire of the parties of the second part and looking to their own genuine requirements have agreed to sell, transfer, assign unto the parties of the second part the said concern M/s J.K. Alloys alongwith their interest in the lease hold rights in the land admeasuring 8 kanals leased out to them vide lease dated 16th December, 1995 and also desired to sell, transfer and assign the leasehold rights in 16 Kanals of land belonging to M/s Trikuta Chemicals Pvt. Ltd., leased out to the said company vide lease dated 21st January, 1986 by J&K SIDCO alongwith boundary wall, guard rooms and 1000 KVA power connection, excluding office building block and plant and machinery and the super structure standing thereon and security deposit with Sales Tax Department, PDD and other related departments hereinafter collectively referred to as the said property, absolute and free from all sorts of encumbrances unto the parties of the second part on the terms and conditions hereinafter appearing.
>
> NOW WHEREAS in order to avoid any controversy in future the parties have decided to reduce the said understanding into writing and to record the terms and conditions of the said sale agreed between them, which are appearing hereinafter.

22. Respondents (M/s J. K. Alloys and M/s Trikuka Chemicals Private Limited), agreed to sell, transfer, assign the property in question in favour of petitioners against total consideration of Rs.4.61 Crores. Rs.1.01 crore was, as is discernible from MOU, paid by petitioners to respondents. Petitioners agreed to pay Rs.1.85 Crores upon fulfilment of the following conditions:

> (a) That the parties of the first part have converted the proprietary concern of M/s J. K. Alloys into a private limited company (Whichever name is allotted by the ROC at the time of applying).

(b) That the lease has been changed by the lessor in the name of the aforesaid company.

(c) That the NOC has to be received from PDD for using the power connection of 1000 KVA for the new activity i.e. Steel melting or power connection of 1,000 KVA has to be transferred in the name of pvt. ltd. company so formed for the new line of activity i.e. Steel Melting, whichever is the requirement as per govt. rules.

(d) That the Industries Department has accorded the necessary permission for the manufacturing of new line of activity i.e. Steel Melting.

(e) That the above-mentioned amount of Rs.1,85,00,000/-

> (One Crore Eighty-Five Lacs only) would be paid within 21 days, against the completion of the above formalities.

(f) The lessor has accorded permission to change the shareholding of pvt ltd company so formed, however, the charges for the said transfer of shareholding to the lessor shall be paid by the parties of the second part.

(g) That against the payment the party of the first shall hand over/deliver physical vacant possession of 8 Kanals of the leasehold land belonging to M/s J.K. Alloys at present and transfer of the entire shareholding of the aforesaid company in favour of the parties of the second part of their nominee(s).

(h) The responsibility of getting the NOC from the J&K State Pollution Control Board for the new line of c/w A.A. no.04/2016 activity i.e. Steel Melting, shall be of the party of the second part.

(i) All the expenses for getting the necessary permissions as per clause 2 (iii) shall be borne by the party of the second party.

(j) Balance sum of Rs.1,75,00,000/- (One Crore Seventy-

> Five Lacs only) would be paid within 21 days of the grant of permission for transfer of the land belonging to M/s Trikuta Chemicals Pvt. Ltd., in favour of the company taken over by the parties of the second part and against delivery of physical vacant possession of the said property to the parties of the second part or the aforesaid company which by then shall belong to the parties of the second part.

23. In terms of MOU, both parties were obliged to cooperate and assist each other for seeking permission to the ROC and lessor for allowing the change in the shareholding of the company. Clause/para (5) of MOU envisions:

> 5. That both the parties should co-operate and assist each other for seeking permission to the ROC & lessor for allowing the change in the shareholding of the said company in its favour and in case any charges are to be paid for allowing the change in the shareholding to the lessor, that shall be paid by the parties of the second part and if any document/assistance is required the same shall be provided by the party of the first part.

24. MOU also envisages that in the event parties of first part (respondents herein) fail to get permission(s) as per Clause 2(iii) & (iv) from Government Departments, in that eventuality entire money received shall be returned to party of second part (petitioners herein). However, it has c/w A.A. no.04/2016 also been envisaged that in case party of first part (respondents) backs out from MOU citing any other reason whatsoever be it financial constraint, adverse market conditions,

recession in the economy, dispute among the partners/directors or any other personal/ business reason, it shall have to pay double the amount received to party of second part (petitioners). What is in this regard conditioned at Clause/para 14 of MOU is advantageous to be reproduced infra:

> 14. That it is also clearly agreed and understood between the parties that in the event of the parties of the first part failing to get such permissions as per Clause 2 (iii) & (iv) detailed herein above from the Govt. Departments, in that eventuality the entire money received till date shall be returned to the party of the second part. But in case the party of the first part backs out from this MOU citing any other reason whatsoever be it financial constraint, adverse market conditions, recession in the economy, dispute among the partners/ directors or any other personal / business reason it shall have to pay double the amount received till date to the party of the second part, however, it is clearly understood that if the Govt. approvals are not accorded as per the Clause 2 (iii) & (i) to the party of the first part, then only the amount received till date shall be returned to the party of the second part and the expenses so incurred for getting the requisite permissions till that date shall be equally shared among the parties.

25. The above quoted passage of Clause 14 provides that in case respondents fail to get permission as per Clause 2

(iii) & (iv) from Government Department in that eventuality the entire money received would be returned to petitioners. Whether respondents had taken any step towards implementation of MOU or not, learned Arbitrator has thoroughly and meticulously gone through c/w A.A. no.04/2016 all the documents produced and record available before him as also evidence adduced by both parties. Learned Arbitrator has discussed all the facets of the matter conscientiously and painstakingly.

26. Whether petitioners herein had also been held responsible and under obligation concurrently as had been held responsible respondents herein in terms of MOU, it is, for that matter, necessary to reproduce Sub-Clause of Clause/ para 14 of MOU infra:

> It is also agreed between the parties that if the party of the second part back out from this MOU citing any reason whatsoever, be it financial constraint, adverse market conditions, recession in the economy, dispute among the partners / directors or any other personal/business reason then the party of the second part shall forfeit/forego money paid to the party of the first part till date.

27. Thus, from the above extracted passage of MOU, it is unequivocally and indubitably evident that it is also enjoined upon parties of second part (petitioners herein) that in the event they (petitioners) pull back from MOU, on and/or for any reason, in such eventuality whatever amount paid by petitioners shall be forfeited by respondents.

28. Nevertheless, MOU also provides that in the event of any dispute arising between parties in regard to interpretation or in regard to implementation of terms and conditions as agreed in MOU,

the same shall be referred to sole arbitrator to be appointed with mutual consent and in the event mutual consent not being possible then in that c/w A.A. no.04/2016 eventuality arbitrator shall be got appointed through court and venue of arbitration shall be Jammu.

29. It was in the month of November 2008, that a communication was addressed by petitioners to respondents, grumbling that despite executing MOU as far as back on 18th March 2008, respondents had failed taking steps towards culmination of contract as were required in terms of MOU, causing delay, and in the interregnum industrial policies, which were, in fact, very basis of their having agreed to acquire property in question, have been withdrawn, and as a sequel whereof exemptions and incentives, available at the time MOU was executed, were either not available or drastically reduced to a much lower percentage. This, according to petitioners, has forced them to revoke MOU. Whether petitioners could have done so or not, was subject-matter of reference before learned Arbitrator.

30. Learned Arbitrator has, bare review of impugned Award reveals, addressed, appreciated and considered pleadings and claims/counter-claims of both parties. Learned Arbitrator, as is discernible from the file and impugned Award as well, recorded statement of witnesses adduced by parties and also discussed it in impugned Award. Statements deposed by parties have also been discussed by learned Arbitrator minutely and meticulously. It had become manifest before learned Arbitrator that c/w A.A. no.04/2016 respondent had converted proprietary concern M/s J. K. Alloys into a private limited company and formed a new company, namely, M/s J. K. Stainless & Alloy Private Limited, 56 Rama Road Nazab Garh Industrial Area Delhi.

31. Learned Arbitrator has noticed and pointed out that petitioners had decided to acquire the leasehold property primarily for 1000 KVA power connection sanctioned in favour of respondents and also for entitlement of 100% excise exemption of new line of activity and at the time of execution of MOU on 18th March 2008, exemption of payment of excise duty was in force and on 27th March 2008, the Central Government reduced said exemption of 100% to 39% from 1st April 2008. In the notice of termination of MOU, petitioners have specifically mentioned that as a result of delay having been caused by respondents, the Industrial Policies, which were in vogue at the time of execution of MOU, and which were in fact the very basis of their having agreed to procure the property in question, has been withdrawn and as a result whereof exemptions and incentives reduced to a much lower percentage, made the project entirely unviable. Mr Ashish Jain (petitioner herein) has also stated so in his statement. Mr Ramesh Kathuria (petitioner herein) has also, in his affidavit, confirmed it as one of the reasons for termination of MOU.

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32. Learned Arbitrator has rightly said in impugned Award that in terms of clause 5 of MOU, both parties had to cooperate and assist each other for seeking permission of ROC and lessor, for allowing change in shareholders of company and in case any charges were required to be paid for allowing the change, that had to be paid by petitioners and if any document/assistance was required same had to be provided by respondents. Learned Arbitrator has also pointed out that spirit of clause 5 of MOU makes it clear that both parties had to assist each other in performing acts for

completion of deal. It has also been observed by learned Arbitrator that it appears from statements of Mr Ramesh Chand Kathuria and Ashish Jain that the government incentive was one of the main considerations for installation of furnace for steel melting at Jammu and after withdrawal of such incentives, the project had become unviable, however, other fact cannot be ignored that both parties had meetings at Jammu and Delhi for completing terms of MOU even after withdrawal of such incentives.

33. Learned Arbitrator has also observed that petitioners herein have alleged that non-performance of contract on part of respondents herein for a long time, made them to revoke MOU and according to learned counsel appearing for petitioners, though no time limit had been mentioned in MOU, but only reasonable time was to be allowed to respondents to perform their acts in terms of MOU.

c/w A.A. no.04/2016 Learned Arbitrator, after considering all facts placed on record, has said that respondents immediately after execution of MOU initiated steps for formation of a new company in place of proprietary concern M/s J. K. Alloys and in this regard certificate of incorporation of new company i.e. M/s J. K. Stainless & Alloy Private Limited was issued by ROC Delhi on 9th April 2008 and other requirements as provided under Sub-Clause (a) to (d) of Clause 2 of MOU remained unfulfilled even after eight months of execution of MOU. Learned Arbitrator has, after verbose discussion, held that both parties have failed in their respective duties which made the project, as per provisions of MOU, redundant as the deal remained incomplete and as a sequel thereof, learned Arbitrator passed the impugned Award, directing respondents to refund Rs.50.50 Lacs to petitioners.

34. Impugned Award dated 27th January 2012 is culmination of arbitration proceedings. It is this Award, which is impugned in applications on hand preferred by both parties under Section 34 of J&K Arbitration & Conciliation Act, 1997.

35. First let me have a discourse concerning history of arbitration. The arbitration and conciliation have been the preferred system of resolution of disputes in India from times immemorial. In the ancient times in India, there existed a system of arbitration in the form of Panchayats.

c/w A.A. no.04/2016 Acceding to Sir Henry Maine [Ancient Village Communities, quoted in 76th Report of the Law Commission of India]:

> In those parts of India, in which village community was most perfect, the authority, exercised elsewhere by the headman, was lodged with what was called the village council or the panchayat.
>
> It was always considered a representative body and whatever was its real number, it always bore the name which recalled its constitution of five persons or Panchayat'. Traces of this method of settling disputes can still be found in certain communities in the country.

36. The Panches were ordinarily elected according to their wealth, social standing and influence in the community. They could decide matters, which were referred, and also matters, which were not referred. The binding authority behind their decisions was the fear of excommunication from community and also from religious services, as Panchayats were incomplete without religious preachers.

37. The system of arbitration was so prevalent in India that Martern, CJ., in Chanbasappa v. Baslinagayya Gokurnaya Hiremath, AIR 1927 Bom 565, was constrained to state:

> It (arbitration) is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a Panch is one of the natural ways of deciding many a dispute in India.

38. Ancient Indian Jurisprudence recognised two methods for deciding disputes between citizens - one way was by judicial process in the courts established by the King, and the other by the different categories of arbitration c/w A.A. no.04/2016 institutions. [See: Dr. Kane, History of Dharmasastra, 1946, Vol.3 p.230]. The puga courts (The Puga court of Yajnavalkya consisted of members belonging to different castes and professions. However, they were staying in the same village or town. Puga courts were later known as Gota courts in Maharashtra. In the state of Karnataka it was known as Dharmasasana) comprised of persons dwelling in the same place, irrespective of their caste or employment and were competent to decide cases in which local public were interested. The streins (guilds) were associations of persons engaged in similar pursuits, of which the merchant's guilds were the most important. They were to decide maters qua their special calling for traders. Social matters vis-à-vis members of a particular community could be investigated and decided at the level of the kulas, which comprised of village elders. [See: M.K. Sharma, Court Procedures in Ancient India, 1978, pp.26-27].

39. On the advent of the British in India, attempts were made to regulate the judicial system in the country. Various regulations and Acts were passed to formulate a system of arbitration in India which would be in consonance with British Jurisprudence. The first attempt at codifying the law was made by Bengal Regulations of 1772 and 1780, where provision was made for submission of disputed accounts to decision by arbitration. In 1781, Sir Elijah Impey's Regulation included a provision that the Judge do recommend, and so far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one c/w A.A. no.04/2016 person, to be mutually agreed upon by parties. In 1787, regulation for the Administration of Justice was passed and it contained rules for referring suits to arbitration with consent of parties. There was no detailed provision, however, to regulate arbitration proceedings. In 1793 Regulation XVI was enacted with a view to promoting reference of disputes of certain categories to arbitration and to encourage people of credit and character to act as arbitrators. Regulation VI of 1813 made some improvement to the Regulation of 1793 and arbitration was available in cases of disputes in regard to land. Bengal Regulation VII of 1822 authorised the Revenue Officers to refer rent and revenue disputes to arbitrators and the Collectors were enjoined to induce parties to agree to such arbitration. Bengal Regulation IX of 1883 authorised the Settlement Officers to refer disputes to arbitration.

40. In 1834, the Legislative Council for India was constituted and Act VIII of 1859, the first Code of Civil Procedure for India, was enacted in 1859 and Chapter VI of the Code contained provisions relating to arbitration. The Code, however, was not applicable to the Supreme Court, or the Presidency Small Cause Courts or non-regulation provinces. The Act was repealed and consolidated by the Civil P. C. of 1877; but the provisions relating to arbitration remained unchanged. Act XIV of 1882 revising the Code did not touch the provisions. The arbitration c/w A.A. no.04/2016 provisions so far provided for arbitration of disputes after they had arisen. There was no provision for reference to arbitration of future disputes. To remedy this, Indian Arbitration Act, 1899, was enacted basing on the English Arbitration Act, 1889. Various sections of the English Act were verbatim transplanted to the Indian soil. The actual application of this Act was, however, originally limited to Presidency towns and was subsequently extended to a few more commercial towns. When the Civil Procedure Code of 1908 was enacted, the clauses relating to arbitration were transferred from the body of the Code to Schedule Second. Various committees noticed the drawbacks in the provisions qua arbitration and advocated for consolidation and amendment of the law and its codification in a separate enactment and that is how the Arbitration Act, 1940, came to the statute book and the Schedule-II to the Civil P was repealed.

41. Arbitration and Conciliation Bill, 1995, was introduced in the Parliament but it could not be passed. As the Parliament was not in sessions and the President was satisfied that circumstances existed, which rendered it necessary for him to take immediate action and in exercise of the powers conferred by clause (1) of Article 123 of the Constitution, the President promulgated Arbitration and Conciliation Ordinance, 1996 (8 of 1996) on 16th January 1996. In order to give further continued effect to the provisions of the said Ordinance, the c/w A.A. no.04/2016 President promulgated the Arbitration and Conciliation Second Ordinance, 1996 (11 of 1996) on 26th March, 1996, which was re-promulgated as the Arbitration and Conciliation (Third) Ordinance. The Bill was passed after due discussions in both Houses of Parliament and received the assent of the President of India on 16th August1996. Insofar as Jammu and Kashmir State is concerned, it has enacted Jammu & Kashmir Arbitration and Conciliation Act, 1997 in the Forty-eighth Year of the Republic of India on 14th November 1997.

42. For deciding the controversy in hand, I would refer to relevant part of Section 34 of the J&K Arbitration and Conciliation Act, 1997 infra:

> 34. Application for setting aside arbitral award - (1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the court only if-
>
> (a) the party making the application furnishes proof that-
>
> (i) a party was under some incapacity, or
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in

force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the c/w A.A. no.04/2016 arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of the State.

Explanation.--Without prejudice to the generality of sub-clause (ii) of clause (b), it is hereby declared for the avoidance of any doubt, that an award is in conflict with the public policy of the State if the making of the award was induced or affected by fraud or corruption or was in violation of Section 58 and 64.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral

tribunal will eliminate the grounds for setting aside the arbitral award.

43. Plain reading of Section 34 in conjunction with Section 5 of the Act of 1997, makes it clear that an arbitration award, that is governed by Part I of the Arbitration and Conciliation Act, 1997, can be set aside only on grounds c/w A.A. no.04/2016 mentioned under Section 34, and not otherwise. Section 5 of the Act of 1997, reads as follows:

> "5. Extent of judicial intervention.- Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

44. It is important to mention here that Section 68 of the Act of 1997 provides that the Act of 1997 has repealed the Arbitration Act, Samvat 2002, with the aim of providing for an arbitral procedure which is fair, efficient and capable of meeting needs of arbitration as also to provide that tribunal gives reasons for an arbitral award and to ensure that tribunal remains within limits of its jurisdiction and also to minimize supervisory roles of courts in arbitral process. It will be seen that none of the grounds contained in sub-clause 2 (a) of Section 34 of the Act of 1997, deal with the merits of the decision rendered by an arbitral award. It is only when it is concluded that the award being in conflict with public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances.

45. Clause (ii) of Subsection 2(b) of Section 34 of Act of 1997, inter alia, provides that the Court may set aside arbitral award if it is in conflict with the public policy. The phrase public policy is not defined under the Act. Therefore, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various c/w A.A. no.04/2016 authorities that expression public authority does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act, and Constitutional provisions.

46. The Supreme Court while dealing with the concept of public policy', in Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly and another (1986) 3 SCC 156, has observed thus: -

> 92. The Indian Contract Act does not define the expression public policy' or opposed to public policy'. From the very nature of things, the expressions public policy', opposed to public policy', or contrary to public policy' are incapable of precise definition. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there

> has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought -- the narrow view' school and the broad view' school.

According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of the narrow view' school would not invalidate a contract on the ground of public policy unless that particular ground had been well established by authorities. Hardly ever has the voice c/w A.A. no.04/2016 of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd. 1902 AC 484, 500: Public policy is always an unsafe and treacherous ground for legal decision.' That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish 1824 2 Bing 229, 252 described public policy as a very unruly horse, and when once you get astride it you never know where it will carry you'. The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Assn. Ltd. 1971 Ch 591, 606: With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles'. Had the timorous always held the field, not only the doctrine of public policy but even the common law or the principles of equity would never have evolved. Sir William Holdsworth in his History of English Law', Vol. III, p. 55, has said:

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.' It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the fundamental rights and the directive principles enshrined in our Constitution.

93. The normal rule of common law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A. Schroeder Music Publishing Co. Ltd. v. Macaulay 1974 1 WLR 1308, however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely c/w A.A. no.04/2016 affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In Kedar Nath Motani v. Prahlad Rai 1960 1 SCR 861, reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at p. 873):

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.' The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void.

47. The Supreme Court in Renusagar Power Co. Ltd. v.

General Electric Co. 1994 Supp 1 SCC 644, the Supreme Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937, which, inter alia, provided that a foreign award may not be enforced under the said Act, if the court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the c/w A.A. no.04/2016 conclusion that public policy comprehended in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, is the public policy of India and does not cover the public policy of any other country. For giving meaning to the term public policy, the Court observed thus:

> 66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression public policy' in Article V (2) (b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that public policy' in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression public policy' in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if

> such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

48. The Supreme Court finally held that:

> 76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have c/w A.A. no.04/2016 been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act.

49. The Supreme Court in Murlidhar Aggarwal v. State of U.P. 1974 (2) SCC 472, while dealing with the concept of public policy observed thus:

> 31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.
>
> 32. ... The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hidebound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decisions on the opinions of men of the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. ... The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere.

50. While interpreting expression public policy in the background of a foreign award, the Supreme Court held that an award contrary to: (1) the fundamental policy of Indian law; (2) the interest of India; (3) justice or morality, would be set aside on the ground that it would be contrary to public policy of India. It proceeded further to hold that contravention of provisions of the Foreign Exchange Regulation Act would be contrary to public policy of India, given that the statute is enacted for the national economic c/w A.A. no.04/2016 interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation. By the same token, ignoring orders passed by superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute

only, would not contravene any fundamental policy of Indian law. When it came to interpreting expression public policy contained in Section 34 (2) (b) (ii) of the Arbitration Act, 1997, which is pari materia to Section 34 (2) (b) (ii) of the Arbitration Act, 1996, the Supreme Court in ONGC v. Saw Pipes, 2003 (5) SCC 705, held:-

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:
>
> (a) Fundamental policy of Indian law; or
>
> (b) The interest of India; or
>
> (c) Justice or morality, or
>
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

c/w A.A. no.04/2016

51. In the result, it is held by the Supreme Court that:

> (A) (1) The court can set aside the arbitral award under Section 34(2) of the Act if the party making the application furnishes proof that:
>
> (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the

submission to arbitration.

(2) The court may set aside the award:

(i)(a) if the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties, (b) failing such agreement, the composition of the Arbitral Tribunal was not in accordance with Part I of the Act.

(ii) if the arbitral procedure was not in accordance with:

(a) the agreement of the parties, or

(b) failing such agreement, the arbitral procedure was not in accordance with Part I of the Act. However, exception for setting aside the award on the ground of composition of Arbitral Tribunal or illegality of arbitral procedure is that the agreement should not be in conflict with the provisions of Part I of the Act from which parties cannot derogate.

(c) If the award passed by the Arbitral Tribunal is in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.

(3) The award could be set aside if it is against the public policy of India, that is to say, if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) if it is patently illegal.

(4) It could be challenged:

(a) as provided under Section 13(5); and

(b) Section 16(6) of the Act.

c/w A.A. no.04/2016 (B) (1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre- estimate of damages;

(iv) on the request of the respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the Contract Act and in the present case by specific terms of the contract."

52. From above it emerges that an arbitral award can only be set-aside if it is found that the party making application under Section 34 of the Act furnished a proof that it was under some incapacity or that the arbitration agreement was not valid under the law to which parties have subjected it or failing any indication thereon under the law for the time being in force or the party making the application was not given proper notice of the appointment of arbitrator or of arbitral proceedings or was otherwise unable to present his case or arbitral award c/w A.A. no.04/2016 deals with a dispute not contemplated by or not falling within terms of submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. It also arises from above adage that award could be set aside if it is against the public policy, that is to say, if it is contrary to fundamental policy of Indian law or interest of India or justice or morality or if it is patently illegal.

53. It may not be out of place to mention here that the terms of contract cannot be even looked into for examining correctness of award. While saying so, the Supreme Court in Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445, held:

14. The High Court did not have the benefit of the principles laid down in Saw Pipes [(2003) 5 SCC 705], and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes [(2003) 5 SCC 705] has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

54. If above being the position, this Court as well cannot interfere with the conclusions arrived at in the arbitral proceeding-subject matter of instant applications inasmuch as learned Arbitrator has verbosely discoursed imperative facets concerning the contract between parties.

c/w A.A. no.04/2016 In McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181, this Court held:

> 58. In Renusagar Power Co. Ltd. v. General Electric Co. [1994 Supp (1) SCC 644] this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or
>
> (c) justice or morality. A narrower meaning to the expression "public policy" was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in ONGC Ltd.v. Saw Pipes Ltd. [(2003) 5 SCC 705] (for short "ONGC"). This Court therein referred to an earlier decision of this Court in Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly [(1986) 3 SCC 156 : 1986 SCC (L & S) 429 : (1986) 1 ATC 103] wherein the applicability of the expression "public policy" on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered.
>
> This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In ONGC [(2003) 5 SCC 705] this Court, apart from the three grounds stated in Renusagar [1994 Supp (1) SCC 644], added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.
>
> 59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependent upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to c/w A.A. no.04/2016 enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77].)

55. What would be a public policy, would be a matter that would depend upon nature of transaction and nature of statute. For that purpose, pleadings of parties and material, brought on record, would be relevant so as to enable the Court to judge concept of what was a public good or public interest or

what would otherwise be injurious to public good at relevant point as contradistinguished by policy of a particular government. The Supreme Court has, in this regard, in Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd., (2006) 11 SCC 245, held:

> "103. Such patent illegality, however, must go to the root of the matter. The public policy, indisputably, should be unfair and unreasonable so as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act.
>
> 104. What would be a public policy would be a matter which would again depend upon the nature of transaction and the nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept of what was a public good or public interest or what would otherwise be injurious to the public good at the relevant point as contradistinguished by the policy of a particular government. (See State of Rajasthan v. Basant Nahata [(2005) 12 SCC 77].)"

56. In DDA v. R.S. Sharma and Co., (2008) 13 SCC 80, the Court summarized the law thus:

c/w A.A. no.04/2016 "21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or (v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality. (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India. With these principles and statutory provisions, particularly, Section 34(2) of the Act, let us consider whether the arbitrator as well as the Division Bench of the High Court were justified in granting the award in respect of Claims 1 to 3 and Additional Claims 1 to 3 of the claimant or the appellant DDA has made out a case for setting aside the award in respect of those claims with reference to the terms of the agreement duly executed by both parties."

57. The Supreme Court in J.G. Engineers (P) Ltd. v. Union of India, (2011) 5 SCC 758, held:

> "27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd.[(2003) 5 SCC 705] held that a court can set aside an award under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is
>
> (a) contrary to the fundamental policy of Indian law; or
>
> (b) contrary to the interests of India; or
>
> (c) contrary to justice or morality; or
>
> (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

58. In Union of India v. Col. L.S.N. Murthy, (2012) 1 SCC 718, the Supreme Court held:

> "22. In ONGC Ltd. v. Saw Pipes Ltd. [(2003) 5 SCC 705] this Court after examining the grounds on which an award of the arbitrator can be set aside under Section 34 of the Act has said:
>
> "31. ... However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar case [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal".

59. As seen herein before in the case of Renusagar Power Co.

Ltd. (supra) that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court if disregarded would be equally violative of the fundamental policy of Indian law.

60. The Supreme Court in ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263, added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Supreme Court held:

"35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and c/w A.A. no.04/2016 enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law.

The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi- judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

xxxx xxxxx xxxx

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

c/w A.A. no.04/2016

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223: (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

61. A decision should be fair, reasonable and objective, is a demand of juristic principle of a "judicial approach". Anything arbitrary and whimsical would, on the obverse side, obviously not be a determination that would either be fair, reasonable or objective. The principle of audi alteram partem that undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2) (a) (iii) of the Arbitration and Conciliation Act. These Sections read as follows:

> "18. Equal treatment of parties. -- The parties shall be treated with equality and each party shall be given a full opportunity to present his case. .....

c/w A.A. no.04/2016 34. Application for setting aside arbitral award - .....

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-.....

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

62. The juristic principle, as said by the Supreme Court in Associate Builders v. DDA (2015) 3 SCC 49, is that a decision, which is perverse or so irrational that no reasonable person would have arrived at the same, is important and requires some degree of explanation. It is settled law that where: (i) a finding is based on no evidence, or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

63. A good working test of perversity is contained in two judgments. In H.B. Gandhi, Excise and Taxation Officer- cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312, it was held:

> 7.....It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

64. In Kuldeep Singh v. Commr. of Police, (1999) 2 SCC 10 at para 10, it was held:

c/w A.A. no.04/2016 10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

65. The Supreme Court in the case of Associate Builders (supra) has also said that it must clearly be understood that when a court is applying the public policy test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Insofar as present case is concerned, learned Arbitrator has comprehensively taken care of and dealt with all aspects of the matter and has discussed facts and circumstances of the case as also evidence led by the parties, in depth and only thereafter rendered impugned Award. It is well settled that once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.

c/w A.A. no.04/2016

66. A Court does not sit in an appeal over the award of an Arbitrator by reassessing or re-appreciating the evidence because an award is to be challenged only under the grounds mentioned in Section 34(2) of the Act of 1997. The Supreme Court in P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594, has held:

> 21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a

> non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.

67. What emerges from the above is that it is not possible to re-examine facts to find out whether a different decision can be arrived at in absence of any ground under Section 34(2) of the Act of 1997. The Supreme Court in Gherulal Parekh v. Mahadeo Dass Maiya, 1959 Supp (2) SCR 406, explained the concept of "morality" thus-

> Re. Point 3 - Immorality: The argument under this head is rather broadly stated by the learned Counsel for the appellant. The learned counsel attempts to draw an analogy from the Hindu Law relating to the doctrine of c/w A.A. no.04/2016 pious obligation of sons to discharge their father's debts and contends that what the Hindu Law considers to be immoral in that context may appropriately be applied to a case under s. 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu Law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of England and it would be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:
>
> The only aspect of immorality with which Courts of Law have dealt is sexual immorality..... Halsbury in his Laws of England, 3rd Edn., Vol. 8, makes a similar statement, at p. 138 :
>
> A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality."
>
> In the Law of Contract by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:
>
> Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible. In the book on the Indian Contract Act by Pollock and Mulla it is stated at p. 157:
>
> The epithet immoral points, in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment."
>
> The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by Courts. The case law both in England and India confines the operation of the doctrine to sexual

> immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.
>
> The word "immoral" is a very comprehensive word.

Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is c/w A.A. no.04/2016 immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of S. 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative text-book writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "the court regards it as immoral", brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognized and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold."

68. A Court can set-aside an arbitral award only if it finds arbitral award in conflict with the public policy of the State as also pregnant with patent illegality. An arbitral award is liable to be set aside if there is an error of law by arbitrator. However, in the present case no such out-and- out and blatant illegality comes to fore from the plain reading of impugned award. Lord Justice Denning in R v. Northumberland Compensation Appeal Tribunal. Ex Parte Shaw., 1952 1 All ER 122 , has explicated that an award could be set-aside for error of law, by holding:

> Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not c/w A.A. no.04/2016 made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c.15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob, (1802) 3 East 18, that an award could be set aside for error of law on the face

of it. This was regretted by Williams, J., in Hodgkinson v. Fernie, (1857) 3 C.B.N.S. 189, but is now well established.

69. It is well settled law for many years and remains so that when a dispute is referred to an arbitrator, he is constituted the sole and final judge of all questions both of law and of fact. Exception is there but that would be where award is outcome of corruption or fraud. Interpretation of any clause or article could be according to wisdom and prevalent situation, but the award will stand unless, on the face of it, arbitrator has tied himself down to some special legal proposition which then, when examined, appears to be unsound. In Champsey Bhara Company v. The Jivraj Balloo Spinning and Weaving Company Ltd., AIR 1923 PC 66, where the Privy Council, while referring to Hodgkinson, has laid down:

> "The law on the subject has never been more clearly stated than by Williams, J. in the case of Hodgkinson v. Fernie (1857) 3 C.B.N.S. 189.
>
> "The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact ..... The only exceptions to that rule are cases c/w A.A. no.04/2016 where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think firmly established viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established." .....
>
> "Now the regret expressed by Williams, J. in Hodgkinson v. Fernie has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended. An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.
>
> It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying:
>
> Inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that then buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52."

> But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, their Lordships think that the judgment of Pratt, J was right and the conclusion of the learned Judges of the Court of Appeal erroneous.

70. This judgment has been constantly followed in India to test awards under Section 30 of the Arbitration Act, 1940.

c/w A.A. no.04/2016 The terms of contract can be express or implied. Conduct of parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to wide nature, scope and ambit of arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of parties. It is also trite that correspondences exchanged by parties are required to be taken into consideration for purpose of construction of a contract. Interpretation of a contract is a matter for arbitrator to determine, even if it gives rise to determination of a question of law. [See: Pure Helium India (P) Ltd. v. ONGC (2003) 8 SCC 593; and D.D. Sharma v. Union of India (2004) 5 SCC 325; and McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181].

71. Once an arbitrator has jurisdiction, no further question can be raised and the Court will not exercise its jurisdiction unless it is found that there exists any bar on the face of award. If arbitrator commits an error in construction of contract that is an error within his jurisdiction. But if he wanders outside contract and deals with matters not allotted to him, he commits a jurisdictional error. Adscititious evidence is admissible in such cases because the dispute is not something which arises under or in relation to contract or dependent on c/w A.A. no.04/2016 construction of contract or to be determined within the award. The ambiguity of award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: Gobardhan Das v. Lachhmi Ram AIR 1954 SC 689; Thawardas Pherumal v. Union of India AIR 1955 SC 468; Union of India v. Kishorilal Gupta & Bros. AIR 1959 SC 1362; Alopi Parshad & Sons Ltd. v. Union of India AIR 1960 SC 588; Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. (1984) 4 SCC 679; and MSK Projects (I) (JC) Ltd. v. State of Rajasthan (2011) 10 SCC 573].

72. Even if a clause or condition of an agreement may have two interpretations and arbitrator's view was clearly possible, if not a plausible one, yet it is not possible to say that arbitrator has travelled outside his jurisdiction or that the view, taken by him, was against terms of contract. If arbitrator has considered the fact situation and placed a construction on the clauses of agreement, which according to him was correct one and one may at the highest say that one would have preferred another construction of the clause, but that cannot make the award in any way perverse, nor can one substitute one's c/w A.A. no.04/2016 own view in such a situation, in place of the one taken by arbitrator, which would amount to sitting in appeal. It is trite that the Court, while considering

challenge to arbitral award, does not sit in appeal over findings and decision of arbitrator. The arbitrator is legitimately entitled to take the view, which he holds to be correct one, after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the arbitrator has to be accepted as final and binding. Same is true about present case. [Vide: Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306; SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63; Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (2010) 11 SCC 296; and Kwality Mfg. Corpn. v. Central Warehousing Corpn. (2009) 5 SCC 142].

73. The Supreme Court has in National Highways Authority of India v. JSC Centrodorstroy (supra) has held that construction of terms of a contract is primarily for an arbitrator or arbitral tribunal to decide and unless the arbitrator or arbitral tribunal construes the contract in such a way that no fair minded or reasonable person could do so, no interference by Court is called for.

74. The position in law has been noticed by the Supreme Court in Union of India v. A.L.Rallia Ram AIR 1963 SC 1685 and Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd 1967 (1) SCR 105, to the effect that arbitrator's c/w A.A. no.04/2016 award both on fact and law is final; that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication unless the objection to the legality of the award is apparent on the face of it. While saying so, the Supreme Court in Maharashtra Electricity Board v. Sterilite Industries (India) and another (2001) 8 SCC 482, observed as under:

> "9. The position in law has been noticed by this Court in Union of India v. A.L. Rallia Ram [AIR 1963 SC 1685] and Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. [(1967) 1 SCR 105] to the effect that the arbitrator's award both on facts and law is final that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award, the following observations in Champsey Bhara & Co. v. Jivraj Balloo Spg and Wvg. Co. Ltd, [(1922-23) 50 IA 324] a decision of the Privy Council, are relevant (IA p. 331) "An error in law on the face of the award means, in Their Lordship's view, that you can find in the award on a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."
>
> 10. In Arosan Enterprises Ltd. v. Union of India [1999 (9) SCC 449], this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator."

Next question is - whether the legal proposition which is the basis of the award for arriving at the conclusion that ONGC was not entitled to recover the stipulated liquidated damages as it has failed to establish that it has c/w A.A. no.04/2016 suffered any loss is erroneous on the face of it? The arbitral tribunal after considering the decisions rendered by this Court in the cases of Fateh Chand, Maula Bux and Rampur Distillery (supra) arrived at the conclusion that "in view of these three decisions of the Supreme Court, it is clear that it was for the respondents to establish that they had suffered any loss because of the breach committed by the claimant in the supply of goods under the contract between the parties after 14th November, 1996. In the words we have emphasized in Maula Bux decision, it is clear that if loss in terms of money can be determined, the party claiming the compensation 'must prove' the loss suffered by him".

75. The construction of the contract agreement is within the jurisdiction of arbitrator having regard to the wide nature, scope and ambit of the arbitration agreement and he cannot be said to have misdirected himself in passing the award by taking into consideration the conduct of parties. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. The Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of arbitrator. An arbitral tribunal must decide in accordance with terms of the contract but if an arbitrator construes a term of contract in a reasonable manner, it will not mean that award can be set aside on this ground. Construction of terms of a contract is primarily for an arbitrator to decide. Arbitrator is entitled to take the view which he holds to be correct one after considering the material before him and after interpreting the provisions of the contract. [See: Pure Helium India (P) Ltd. v. ONGC (2003) 8 SCC 593;

c/w A.A. no.04/2016 D.D. Sharma (supra); McDermott International Inc (supra); Rashtriya Ispat Nigam (supra); Sumitomo Heavy Industries Ltd (supra); Kwality Mfg. Corpn. (supra); Associate Builders v. DDA (supra); ONGC Ltd v. Saw Pipes Ltd (supra); and ONGC Ltd v. Western Geco International Ltd (supra)].

76. For all what has been discussed above it is apropos to say that the construction of terms of contract/MOU by learned Arbitrator is completely consistent with the principles laid down by the Supreme Court. The view(s) taken by learned Arbitrator is/are certainly the possible view(s), to say at least. I do not see any reason to interfere.

77. Based on the foregoing discussion and discourse, applications on hand, bearing A.A. no.12/2012 and no.04/2016, are sans merit and are accordingly dismissed. As a corollary, the arbitral award dated 27th January 2012 is upheld. Interim direction(s), if any, shall stand vacated.

78. Record be sent down/returned.

(Tashi Rabstan) Judge Jammu 17.07.2018 Madan Verma' c/w A.A. no.04/2016